

THE HONORABLE BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

EMILY TORJUSEN,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER  
CORPORATION d/b/a AMTRAK; and  
DOES ONE THROUGH FIFTY,

Defendants.

Case No. 3:18-cv-05785-BHS

**DEFENDANT NATIONAL RAILROAD  
PASSENGER CORPORATION'S  
MOTION FOR A NEW TRIAL OR IN  
THE ALTERNATIVE REMITTITUR**

**NOTE ON MOTION CALENDAR:  
MAY 27, 2022**

**INTRODUCTION AND SUMMARY OF RELIEF REQUESTED**

Defendant National Railroad Passenger Corporation (“Amtrak”) respectfully moves for a new trial, pursuant to Fed. R. Civ. P. 50(b) and 59. Such relief is necessary to address the prejudice that resulted from Plaintiff’s counsel repeatedly telling the jury in closing argument that Amtrak was being deceitful and distorting the truth. This misconduct and Plaintiff’s improper anchoring tactics resulted in an excessive verdict against the weight of the evidence. In the alternative, Amtrak seeks remittitur.

**AUTHORITY AND ARGUMENT**

**I. AMTRAK SHOULD BE GRANTED A NEW TRIAL**

After a jury trial, a court may grant a new trial for any reason for which a new trial has previously been granted in an action in federal court. Fed. R. Civ. P. 59(a)(1)(A). “Historically recognized grounds include, but are not limited to, claims ‘that the verdict is against the weight

of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.” *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). “Ultimately, the district court can grant a new trial under Rule 59 on any ground necessary to prevent a miscarriage of justice.” *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd*, 762 F.3d 829, 842 (9th Cir. 2014). Although each error discussed herein warrants granting a new trial, the impact of trial errors must be considered cumulatively. *See Jerden v. Amstutz*, 430 F.3d 1231, 1240 (9th Cir. 2005); *Gordon Mailloux Enters., Inc. v. Firemen's Ins. Co. of Newark, N.J.*, 366 F.2d 740, 742 (9th Cir. 1966) (“We conclude it too must be reversed; although the errors requiring reversal, if considered separately, were perhaps harmless, their cumulative effect was prejudicial.”).

#### A. A New Trial is Warranted Because Plaintiff’s Counsel Made Improper Statements Repeatedly During Closing

In response to Amtrak’s motion *in limine* to preclude inflammatory statements and arguments attempting to disparage Amtrak, the Court said it would rule on any objection when made. Declaration of Andrew G. Yates (“Yates Decl.”), May 2, 2022, at ¶ 2 and Ex. A (3/7/22 TT at 14:20-24). The Court, however, warned “the need to avoid these things applies to both parties.” *Id.* at 14:23-24.

Despite this warning from the Court, Plaintiff’s counsel repeatedly told the jury that Amtrak was trying to deceive them and twisted and distorted what happened. Plaintiff’s counsel made the following remarks in his summation where he knew they would have the most impact on the jury.

- Why do we spend time talking about what she knows – what we know she still can do? And the answer is simple. The answer is because their defense in this case is to distract you from the harm, ***to distort the evidence, and to deceive you*** about what your role is and what her damages are. Yates Decl., at ¶ 3 and Ex. B (4/1/2022 TT 66:3-8).<sup>1</sup>

Amtrak immediately objected to this, which the Court overruled. *Id.* at 66:9-10.

<sup>1</sup> In this brief, when quoted material is in bold and italics, the emphasis has been added.

1 Emboldened by the Court’s decision to give him free rein, Plaintiff’s counsel proceeded to tell  
 2 the jury that Amtrak was deceitful and made this the central theme of his closing:

- 3 • “Is there something wrong with a lawyer communicating with witnesses he or she knows  
 4 are going to come to trial? I think there is something wrong if the lawyer doesn’t do that.  
 5 But ***somehow by deceiving and twisting and distorting what really happened***, they are  
 6 suggesting that Emily shouldn’t be compensated because she hired lawyers.” *Id.* at 69:9-  
 7 14.
- 8 • “Instead, in their constant attempt to ***distract and distort and deceive***, they talked about  
 9 how much money he makes.” *Id.* at 70:12-14.
- 10 • “Second of all, they didn’t bring any evidence in to show that there is anybody who is  
 11 qualified, who criticizes the DTI test – technology, standards, platform, operation. Again,  
 12 ***they want you to be deceived.***” *Id.* at 71:12-15.
- 13 • “What she said was that she was ‘hopeful that Emily would be able to recover.’ She did  
 14 not categorically state that she would recover. Dropping a word, ignoring a word changes  
 15 meaning. ***Again, distort, deceive.***” *Id.* at 78:17-20.<sup>2</sup>
- 16 • “By parsing out one sentence and ignoring the rest, ***you can deceive***. We aren’t here to  
 17 ***deceive*** you.” *Id.* at 82:16-17.
- 18 • “They prefer that the brain injury remain hidden....” *Id.* at 84:7.
- 19 • “Don’t let ***the deception, the deceit, the distortion*** substitute what she has been able to  
 20 accomplish for what she has lost.” *Id.* at 100:14-16.

21 After Plaintiff’s counsel completed his closing argument, Amtrak’s counsel moved for a  
 22 mistrial. *Id.* at 102:16-24. In denying that motion, the Court stated, “You did make one  
 23 objection. If you had made more, the Court would have intervened there and not drawn attention  
 24 to it.” *Id.* at 102:25-103:2. The Court denied the mistrial motion, despite recognizing the

25 \_\_\_\_\_  
 26 <sup>2</sup> See also *id.* at 99:6-8 (“But unlike the Bible, where you take an ***eye for an eye***, ***Amtrak***  
 27 ***doesn’t have psyche or a soul that could be equally damaged to Emily.***”) (emphasis added)  
 See *id.* at 99:9 (Amtrak’s objection to same).

1 problems caused by Plaintiff's counsel's comments:

2 [U]se of the word "deception" is not the best way to approach this.  
 3 ... But in rebuttal I think this "deception" -- of course what's the  
 4 difference between "deception" and "distortion"? I just think you  
 can avoid using the terms.

5 *Id.* at 103:2-12.

6 After taking a recess, the Court became more concerned about Plaintiff's counsel's  
 7 comments about Amtrak's conduct at trial:

8 Before we bring the jury in, Mr. Petru, I am concerned about the  
 9 word "deceiving." That is impugning the character of opposing  
 10 counsel here. I think it would be appropriate -- it is your choice. It  
 11 would be appropriate for you in your rebuttal to say: By using the  
 word to "deceive," I did not mean to impugn the character of  
 counsel.

12 *Id.* at 103:16-22.

13 On rebuttal, Plaintiff's counsel stated, "[B]efore I talk about the substance of counsel's  
 14 argument, I want to make sure that each and every one of you understand when I used the word  
 15 'deceive' earlier, I don't intend and don't impugn the character of counsel." *Id.* at 130:22-131:1.  
 16 This belated attempt by Plaintiff's counsel (as opposed to the Court) to cure the misconduct was  
 17 not sufficient. The bell cannot be unrung.

18 1. Plaintiff's Counsel's Statements Impugning the Character of Amtrak and its Defense  
 19 Counsel were Improper

20 The Supreme Court has stated that counsel "must not be permitted to make unfounded  
 21 and inflammatory attacks on the opposing advocate." *United States v. Young*, 470 U.S. 1, 9  
 22 (1985) (noting that the district judge should have dealt with the improper argument of counsel  
 23 "promptly"). Similarly, the Ninth Circuit has held that inflammatory comments impugning  
 24 opposing counsel are improper. *See, e.g., Leinweber v. Tilton*, 490 Fed. Appx. 54, 56-57 (9th  
 25 Cir. 2012) (holding that the prosecutor's comments regarding defense counsel's dishonorable  
 26 character was improper, but did not violate the defendant's due process ***because the trial judge***  
 27 ***sustained the defense objections and gave a curative instruction***) (emphasis added); *Hein v.*

1 *Sullivan*, 601 F.3d 897, 913 (9th Cir. 2010) (finding that the prosecutor’s improper comment that  
 2 the defense was “dishonest” did not violate the defendant’s due process ***because the trial judge***  
 3 ***sustained an objection and gave an instruction*** that there was no evidence that any of the  
 4 lawyers in the case committed any wrongdoing) (emphasis added); *United States v. Sanchez*, 176  
 5 F.3d 1214, 1224–25 (9th Cir. 1999) (finding misconduct because prosecutor’s comments were a  
 6 denigration of the defense where prosecutor stated “the defense in this case read the records and  
 7 then told a story to match the records. And, ladies and gentlemen, I’m going to ask you not to  
 8 credit that scam that has been perpetrated on you here.”).

9 “Comments by counsel must be directed to the strength of the evidence and not amount  
 10 to an ad hominem attack on opposing counsel for being part of a purported scheme to mislead.”  
 11 *R.J. Reynolds Tobacco Co. v. Gafney*, 188 So.3d 53 (Fla. 4th Dist. Ct. of Appeals 2016). The  
 12 appellate court in that case described the problem as follows:

13 The comments at issue regarding defense counsel did not involve  
 14 evidence, or deductions and conclusions therefrom. Whether these  
 15 comments are viewed as an unsubstantiated accusation, an  
 16 unflattering characterization, or as a mere inadvertent or unintended  
 17 flourish, they were neither reasonable nor permissible inferences to  
 18 be drawn from the evidence adduced at trial. ***Comments accusing***  
***an opposing party's attorney of wanting the jury to evaluate the***  
***evidence unfairly, of trying to deceive the jury, of deliberately***  
***distorting the evidence, or of participating in a concerted scheme***  
***to do so, have no place in our legal system.***

19 *Id.* at 59 (emphasis added).

20 The Supreme Court of Washington has likewise been very clear that comments  
 21 impugning the integrity of defense counsel are improper. In *State v. Lindsay*, 180 Wn.2d 423,  
 22 443 (2014), the Supreme Court held that a comment by the prosecutor in his closing that the  
 23 defendant’s argument was a “crook” “directly impugn[ed] defense counsel.” The comment was  
 24 deemed to be improper because it “implies ***deception*** and dishonesty.” *Id.* (emphasis added).  
 25 Here, Plaintiff’s counsel did not mince his words and “imply” that Amtrak and its counsel were  
 26 deceptive and dishonest. He flat out called them “deceptive” and “deceiving.”  
 27

2. The Improper Comments Require a New Trial

In the Ninth Circuit, to obtain a new trial based on attorney misconduct, the “flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.” *Kehr v. Smith Barney, Harris Upham, Co.*, 736 F.2d 1283, 1286 (9th Cir. 1984) (quoting *Standard Oil Co. v. Perkins*, 347 F.2d 379, 388 (9th Cir. 1965)); see also *SEC v. Jasper*, 678 F.3d 1116, 1129 (9th Cir. 2012) (same).

In *Kehr*, the Ninth Circuit upheld the denial of a new trial even though the attorney’s comments were improper. *Kehr*, 736 F.2d at 1286. It did so for three reasons: (1) “the offending remarks occurred primarily during opening statement and closing argument, rather than throughout the course of the trial[;] [t]hey were isolated, rather than persistent”; (2) “opposing counsel never objected during the closing argument or moved for a mistrial”; and (3) unlike some cases where attorney misconduct required a new trial, the jury’s award of damages in this case was not excessive.” *Id.* Looking at these three factors, Amtrak is entitled to a new trial.

First, although the offending remarks were only in counsel’s closing argument, they permeated the closing; they were persistent, not isolated.<sup>3</sup> Moreover, this was a relatively short four-day trial where liability was stipulated. The Ninth Circuit has also held that improper comments during a closing argument can satisfy the first *Kehr* factor. “For conduct to ‘permeate’ a proceeding it need not occur throughout the proceeding. Were that the case, the most blatant, unjustified, and prejudicial misconduct in closing argument would never warrant reversal because it would have occurred only at the end of a trial.” *Bird v. Glacier Electric Corp.*, 255 F.3d 1136, 1145 n.16 (9th Cir. 2001); see also *Globefill Inc. v. Elements Spirits, Inc.*, 640 Fed. Appx. 682, 684 (9th Cir. 2016) (ordering a new trial even though defense counsel’s misconduct

<sup>3</sup> One instance of attorney misconduct may be sufficient for a mistrial. See *County of Maricopa v. Mayberry*, 555 F.2d 207, 217 (9th Cir. 1977). There, a lawyer asked an expert an improper question and the trial court admonished the jury to disregard it. On appeal, the Ninth Circuit determined that even one improper question was a sufficient basis to require reversal of a jury verdict where the misconduct was “an intentional act, done with the sole purpose of bringing to the jury something that should not have been heard.” *Id.* at 219.

1 was limited to closing argument because the misconduct sufficiently permeated the entire  
2 proceeding).

3 In addition, the Ninth Circuit has stated that improper comments during only a closing  
4 argument can be sufficient to warrant a new trial because they occur at the end of the case where  
5 they leave the jury with a “final impression.” *Hern v. Intermedics*, 210 F.3d 383 at \*4 (9th Cir.  
6 2000) (unpublished). “The statements were one of the last things the jury heard before  
7 deliberating.” *Id.* The same is true here.

8 The second *Kehr* factor is whether the party harmed by the improper conduct of counsel  
9 objected to the conduct or moved for a mistrial. As discussed above and in Point I (A) (3) below,  
10 Amtrak objected to Plaintiff’s counsel’s comments and moved for a mistrial.

11 The third *Kehr* factor is whether the misconduct resulted in prejudice to the other side in the  
12 form of an excessive verdict. As discussed below in Points I (B) and II, the verdict in this case  
13 was excessive. It also has a punitive flavor to it, which is not surprising given that the Plaintiff’s  
14 counsel urged the jury to arm itself to deal with Amtrak’s deceiving, distorting and distractive  
15 conduct at trial. Plaintiff’s counsel intended his comment to inflame the jury, and the excessive  
16 nature of the jury’s verdict leads to the conclusion that the jury was unduly influenced by his  
17 misconduct.

18 3. Amtrak Was Not Required to Object Each Time Counsel Made Improper Comments  
19 Because the Court Overruled its Original Objection

20 When the Court overruled Amtrak’s objection the first time the improper statements were  
21 made, Amtrak was not required to object further. The Court was already on notice of the  
22 objection and the basis for the objection. Because Amtrak’s objection was overruled, Plaintiff’s  
23 counsel was able to persist in stating that Amtrak was deceiving and distorting the truth.

24 The Ninth Circuit has recognized that a defense counsel entering “objections to the  
25 language and tenor of the prosecutor’s closing remarks by way of a mistrial motion after the  
26 government finished its summation” is “an acceptable mechanism by which to preserve  
27 challenges to prosecutorial conduct in a closing argument in lieu of repeated interruptions to the

1 closing arguments ....” *United States v. Prantil*, 764 F.2d 548, 555 n.4 (9th Cir. 1985). In 2014,  
 2 the Supreme Court of Washington expressly adopted the *Prantil* rule. *See State v. Lindsay*, 180  
 3 Wn.2d 423, 441-42 (2014) (even though defense counsel did not object to many of the improper  
 4 attacks upon him in the prosecutor’s closing, his motion for a mistrial immediately after the  
 5 prosecutor’s closing argument was sufficient to preserve review of the issue).

6 If Amtrak did object more than once, it would have given the jury reason to believe that  
 7 Amtrak was in fact trying to be obstructionist or distort the facts. *See Young*, 470 U.S. at 13  
 8 (noting that “interruptions of arguments, either by opposing counsel or the presiding judge, are  
 9 matters to be approached cautiously”). The Ninth Circuit also has acknowledged what every trial  
 10 lawyer knows. “[T]rial lawyers are reluctant to make frequent objections because the jury may  
 11 think they have something to hide ....” *United States v. Mesterhazy*, 15 F.3d 1093, 1992 WL  
 12 524313, at \*1 (9th Cir. 1993). “[C]onstant objections are certainly not required, as they could  
 13 antagonize the jury.” *Kehr*, 736 F.2d at 1286.

14 Had Amtrak objected a second or third time, it would have run the risk of the jury thinking  
 15 that Amtrak was acting nefariously and substantiated Plaintiff’s counsel’s improper claims. It  
 16 also would have carried significant risk of antagonizing the jury. Amtrak also does not know  
 17 how the Court would have handled a second or third objection without “draw[ing] attention to  
 18 it.” Ex. B (4/1/2022 TT at 103:2).

19 4. Plaintiff’s Counsel’s Statement on Rebuttal Did Not Remedy the Injury Amtrak and its  
 20 Counsel Sustained

21 At the very least, the Court should have issued a curative instruction that told the jury that  
 22 Plaintiff’s counsel’s comments were improper and should be disregarded by the jury. *See, e.g.,*  
 23 *Maxwell v. Gatz of San Diego*, 714 Fed App’x 641 (9th Cir. 2017) (defense counsel’s improper  
 24 remarks during his closing argument did not warrant a new trial ***because the potential prejudice***  
 25 ***from those remarks was addressed and ameliorated by the trial judge’s curative instructions***  
 26 and plaintiff’s counsel’s opportunity to rebut defense counsel’s statements); *Sanchez*, 659 F.3d  
 27 at 1258 (“Even in the absence of objections by defense counsel, a trial judge should be alert to

1 deviations from proper argument and take prompt corrective action as appropriate.”); *United*  
 2 *States v. Randall*, 162 F.3d 557-60 (9th Cir. 1998) (“We conclude that the district court’s  
 3 cautionary instructions cured any prejudice resulting from the prosecutor statements.”).

4 Instead of issuing a curative instruction, the Court merely suggested that Plaintiff’s  
 5 counsel should explain to the jury that he did not mean to impugn the character of Amtrak’s  
 6 counsel. Ex. B (4/1/2022 TT at 102:25-103:22). By saying nothing to the jury, however, the  
 7 Court in effect endorsed these improper comments. The jury heard nothing from the Court saying  
 8 that these comments were improper or that they should be disregarded. The only thing they heard  
 9 from the Court was that Amtrak’s objection to the first “deceiving” comment was overruled. As  
 10 such, the jury likely concluded that these comments by Plaintiff’s counsel were appropriate and  
 11 accurate because the Court allowed them to be said over and over.

12 This case is very similar to *R.J. Reynolds* where the trial judge also recognized that the  
 13 comments by plaintiff’s counsel about defense counsel were improper and, like this case,  
 14 suggested to plaintiff’s counsel that he “may want to clarify” his remarks to the jury. The  
 15 appellate court found this was not sufficient to cure the prejudice from plaintiff’s counsel’s  
 16 improper remarks.

17 Considering that this comment, in the words of the trial judge,  
 18 “jumped right out at [him],” it is highly probable that it influenced  
 19 the jury as well. A subsequent curative instruction by the court  
 20 aimed at rectifying this error would in all likelihood have been  
 21 insufficient to remedy the damage. Further, [plaintiff’s] counsel’s  
 attempt to mitigate the consequences of his statements by explaining  
 his intentions was also wholly ineffective.

22 *R.J. Reynolds*, 188 So.3d at 60. As a result, the appellate court ordered a new trial:

23 Appellee’s counsel tried to explain he was not suggesting that the  
 24 defense attorneys were participants in any conspiracy. **We are not**  
 25 **persuaded that this attempt at clarification served to unring the**  
 26 **bell; rather, it appears to us that these comments were**  
 27 **reasonably likely to prejudice the jury and fatally impair the**  
**fairness of the proceedings.**

*Id.* (emphasis added).

1 Similarly, this Court's remedy to the problem caused by Plaintiff's counsel's improper  
 2 remarks was too little, too late. It also was not sufficient to remedy the injury that Amtrak, as  
 3 opposed to its counsel, sustained. The issue is not so much that these statements did or did not  
 4 mean to impugn the character of counsel, but whether the jury's verdict was the product of  
 5 passion and prejudice as a result of counsel's repeated statements that Amtrak deceived and  
 6 distorted and twisted the truth. The Court never suggested that counsel should correct his  
 7 statements that Amtrak was deceitful, only that he was not personally attacking the character of  
 8 its lawyers. This is not enough. The jury's verdict was a product of passion and prejudice, and  
 9 a new trial is necessary to remedy the injury that Amtrak sustained.

10 **B. A New Trial is Warranted Because Plaintiff's Counsel Anchored the Jury to \$23+**  
 11 **Million**

12 Prior to trial, the Court denied Amtrak's motion *in limine* to preclude Plaintiff's counsel  
 13 from making an anchoring argument to the jury. Ex. A (3/7/22 PTC 24:5-12).

14 During closing argument, Plaintiffs' counsel told the jury that Plaintiff was seeking at  
 15 least \$23 million or more for non-economic damages. *See* Ex. B (4/1/2022 TT 92:10-96:19).  
 16 Plaintiff's counsel initially asked for \$21 million consisting of: \$2 million for the brain injury  
 17 that Plaintiff sustained in the last four and a half years (*id.* at 92:10-13); \$5 million for the next  
 18 50 years "of going through life with a brain injury" (*id.* at 93:24-93:2); \$4 million for post-  
 19 traumatic stress disorder in the four and a half years preceding the derailment (*id.* at 93:8-9); and  
 20 \$10 million for emotional damages for the next 58 years (*id.* at 93:9-10). However, Plaintiff's  
 21 counsel then asked for another \$2 million "for what they did to her on that day, what she  
 22 experienced on that day, we believe another \$2 million would be fair compensation for the last  
 23 four and a half years." *Id.* at 96:15-19.

24 This \$23 million anchoring resulted in a grossly excessive award in the amount of \$8  
 25 million. Dkt. 64. Furthermore, the jury's verdict was not supported by the evidence.

1        1. The Jury's Verdict of \$8 Million for Non-Economic Damages Was Excessive and  
 2        Against the Weight of the Evidence.

3        At trial, there was no testimony from any witness that Plaintiff was emotionally incapable  
 4        of doing anything at any point in time. Indeed, Plaintiff testified that she returned to her studies  
 5        at the University of Washington shortly after the derailment and made the dean's list at every  
 6        quarter after the accident while taking rigorous courses such as Arabic. Her GPA after the  
 7        accident was very high, ranging from 3.53 the first quarter she returned to school to 3.9. She  
 8        also interned at the Washington Capitol. She graduated with a triple major in political science,  
 9        international studies, and Near Eastern language/civilizations. Ex. B (4/1/2022 TT 7:21-18:12).

10       After the accident, Plaintiff traveled to numerous countries including France, Italy,  
 11       England, Germany, Bosnia, Croatia, Slovenia, Romania, and Egypt, where she took the plane,  
 12       bus, train. She also went hiking. She moved to Cairo after graduation. Ex. B (4/1/2022 TT  
 13       18:14-34:23).

14       Plaintiff's LinkedIn resume, which was admitted into evidence, was impressive for her  
 15       young age. She is currently the Chief Executive Officer of Geek Lab Holdings in Cairo, Egypt  
 16       where she resides. She has four to six people reporting to her. Ex. B (4/1/2022 TT 35:21-37:4).

17       Plaintiff also has written articles for various publications/websites. These include serious  
 18       subjects such as her love of Cairo, Yemen's fragile peace talks, and Egypt's role in Libya's civil  
 19       war. She also wrote articles on lighter subjects, such as the worst movie sequels, refreshing foods  
 20       to keep you hydrated, how to start a career in modeling, and on-line shopping. Ex. B (4/1/2022  
 21       TT 30:9-31:25, 37:22-38:14, 40:12-42:13, 47:15-48:10).

22       Plaintiff testified that she had hoped to "get a master's degree, to learn Arabic, to become  
 23       fluent in it, do something related to the Middle East, work in politics, and then, you know, have  
 24       a family." Yates Decl., at ¶ 4 and Ex. C (3/31/2022 TT 185:24-186:4). Nothing would have  
 25       prevented Plaintiff from accomplishing any of these things. Since the derailment, Plaintiff made  
 26       the dean's list every quarter, traveled extensively, and currently lives in Cairo. There was  
 27       absolutely no testimony or evidence at trial that prevents Plaintiff from pursuing graduate school,

1 getting involved in politics, and having a family. There was no testimony that Plaintiff's grades  
 2 were not good enough to go into graduate school; there was no testimony that Plaintiff's graduate  
 3 school application was rejected. Nor was there any testimony that Plaintiff could not marry or  
 4 bear children.

5 There was nothing distinctive about Plaintiff's behavior with her family and partner that  
 6 was tied to the derailment. Plaintiff admitted that she had arguments, issues, disagreements with  
 7 her father prior to the derailment. Ex. B (4/1/2022 TT 52:11-14). Her mother testified that prior  
 8 to the derailment, Plaintiff had been unhappy for a period of time and took her to see a counselor  
 9 for two sessions, and after the derailment, Plaintiff was "very, very short fused, easily upset. My  
 10 relationship with her is very fragile." Ex. C (3/31/2022 TT 119:9-10). Even Dr. John Crossen  
 11 agreed that Plaintiff had emotional issues, including outbursts in class as far back as high school.  
 12 Yates Decl., at ¶ 5 and Ex. D (3/30/2022 TT 132:3-133:2). Plaintiff testified that she "snaps" at  
 13 her partner. Ex C (3/31 TT 159:11-14). But Plaintiff also testified that she works with her partner  
 14 at Geek Labs. *Id.* at 164:1-6. So, she not only lives with her partner, she also works with him.  
 15 Again, there is nothing that causally connects Plaintiff's post-derailment behavior to the  
 16 derailment.

17 Plaintiff admitted that before the derailment, she "was really quite shy. I barely ever  
 18 spoke to people." Ex. C (3/31/2022 TT 157:22-158:4). So, her social behavior post-derailment  
 19 is not something that existed only after the derailment. After the derailment, she claimed she  
 20 attended social events and would make "one-minute appearances," then "run away." *Id.* at 138:3-  
 21 12. This is consistent with her behavior pre-derailment. Except for her mother, with whom  
 22 Plaintiff has not lived with for several years, there was no one to corroborate Plaintiff's claim  
 23 that she has an "uncontrollable" reaction "at least once a month" or that she "snaps" at people on  
 24 a weekly basis *Id.* at 158:5-159:5). As Chief Executive Officer of a company, she is under stress  
 25 and manages people whose work must meet certain standards to meet the company's needs.  
 26 Indeed, she testified that she is often dissatisfied with the work of her subordinates and has fired  
 27 many people. *Id.* at 157:4-17. Plaintiff did not establish any relationship between her work stress

1 and her post-derailment experience.

2 Plaintiff's post-derailment experience with riding public transportation, including trains,  
3 also does not support the jury's non-economic damages of \$8 million. Plaintiff stated that she is  
4 "very easily startled" when the bus hits a pothole, and she listens to music whenever she takes  
5 public transportation and is "prone to crying." Ex. C (3/31/2022 TT 132:24-133:17). But as  
6 described above and in her testimony, none of this has prevented Plaintiff from traveling to  
7 numerous countries including France, Italy, England, Germany, Bosnia, Croatia, Slovenia,  
8 Romania, and Egypt, where she regularly took the plane and other forms of public transportation,  
9 including the bus and the train. Ex. B (4/1/2022 TT 18:13-34:17).

10 Plaintiff's neuropsychological expert, Dr. Elizabeth Scovel admitted that she was not  
11 familiar with Plaintiff's experiences and based her opinion only on her last conversation with  
12 Plaintiff when she was living in Cairo and had stated that she was reluctant to engage in certain  
13 things. Ex. C (3/31/2022 TT 56:13-19). In fact, Dr. Scovel testified that in 2020, she had only a  
14 brief conversation with Plaintiff who stated that she wanted to relocate to another part of Cairo  
15 so she wouldn't have to take public transportation to go to work. *Id.* at 54:20-55:1. This brief  
16 conversation, without more, was insufficient for a jury to determine that Plaintiff was unable or  
17 incapable of taking public transportation or that taking public transportation was affecting her  
18 life. Plaintiff testified that when she returned to Cairo to live in June 2021, she commuted to  
19 work via the metro. Ex. B (4/1/2022 TT 32:16-21, 34:13-17). And Dr. Scovel's testimony that  
20 Plaintiff was "inhibited to engage in certain pursuits" (Ex. C [3/31/2022 TT 43:7-25]) was not  
21 corroborated by the witnesses' testimony, including Plaintiff's own testimony. Again, in the four  
22 plus years post-derailment, Plaintiff traveled to numerous countries, took public transportation,  
23 became the Chief Executive Officer of a company, and resides in Cairo, Egypt where she  
24 continues to learn and practice Arabic, a language that she has been learning since her freshman  
25 year at the University of Washington.

26 Plaintiff's treating provider Dr. Crossen reported that after Plaintiff's first visit and testing  
27 in August 2018, he was "optimistic" her symptoms would continue to resolve. After a three-year

1 absence, he saw her again in 2021 when he again reported that he was “optimistic” for Plaintiff’s  
2 further recovery. Ex. D (3/30/2022 TT 119:8-16, 124:7-9, 129:7-10).

3 Dr. Scovel saw Plaintiff in 2018 and 2020 and did neurological testing both times. In  
4 2018, she reported being hopeful that Plaintiff may “fully recover.” After seeing her in 2020,  
5 Dr. Scovel described Plaintiff’s improvement from 2018 to 2020 as “significant.” Dr. Scovel  
6 also said Plaintiff’s prognosis was “better” than it was in 2018. Ex. C (3/31/2022 TT 50:13-51:1,  
7 60:10-25, 67:20-69:8).

8 As to Plaintiff’s emotional aspects, Dr. Scovel testified at trial that she has “not spoken  
9 to [Plaintiff] about the reasons” why Plaintiff was reluctant to engage in therapy and could only  
10 “surmise that she is reluctant because it is very uncomfortable for her.” Ex. C (3/31/2022 TT  
11 78:16-25). Amtrak objected to this question and response, which this Court overruled. *Id.* at  
12 79:1-2. Because Dr. Scovel had never spoken to Plaintiff about why she was not engaging in  
13 therapy, it was error for this Court to permit Dr. Scovel to speculate as to the reasons.

14 Dr. Spohr, who treated Plaintiff for her physical injuries, acknowledged that: (1)  
15 Plaintiff’s neurological exams were always normal; (2) she had a minimally displaced fracture  
16 of the clavicle; (3) that fracture healed with minimal treatment (just wearing a sling); and (4) the  
17 last time she saw Plaintiff was seven or eight months ago when her physical exam was normal,  
18 and Plaintiff reported that her headaches had gotten better. Ex. D (3/30/2022 TT 163:10-23,  
19 164:15-165:7, 184:12-186:2).

20 2. The Jury Was Misled Into Thinking that it Awarded Fair and Reasonable Damages.

21 The Third Circuit has held that plaintiffs’ lawyers may not “request a specific dollar  
22 amount for pain and suffering in [their] closing remarks.” *Waldorf v. Shuta*, 896 F.2d 723, 744  
23 (3d Cir. 1990). “In the final analysis, a jury trial should be an appeal to the rational instincts of a  
24 jury rather than a masked attempt to import into the trial elements of sheer speculation on a matter  
25 which by universal understanding is not susceptible to evaluation on any such basis.” *Id.* (internal  
26 quotations omitted).

27 The First Circuit also has outlawed mention of either a lump sum or formula for

1 computing pain-and-suffering damages during opening and closing statements. *Rodríguez v.*  
 2 *Señor Frog’s De la Isla, Inc.*, 642 F.3d 28, 37-38 (1st Cir. 2011); *see also Bielunas v. F/V Misty*  
 3 *Dawn, Inc.*, 621 F.3d 72, 78-79 (1st Cir. 2010).

4 In the Second Circuit, “specifying target amounts for the jury to award is disfavored.”  
 5 *Consorti v. Armstrong World Industries, Inc.*, 72 F. 3d 1003, 1016 (2d Cir. 1995), *vacated on*  
 6 *other grounds*, 518 U.S. 1031 (1996). “Such suggestions anchor the juror’s expectations of a fair  
 7 award at a place set by counsel, rather than by the evidence. . . . A jury is likely to infer that  
 8 counsel’s choice of a particular number is backed by some authority or legal precedent.” *Id.*; *see*  
 9 *also Lightfoot v. Union Carbide Corp.*, 110 F. 3d 898, 912 (2d Cir. 1997) (district judges have  
 10 discretion either to “prohibit counsel from mentioning specific figures” or to allow it with certain  
 11 safeguards, “including cautionary jury instructions”).

12 Although the Ninth Circuit Civil Model Jury Instruction § 1.7 instructs the jury that  
 13 “[a]rguments and statements by lawyers are not evidence,” anchoring by counsel is still unfair,  
 14 prejudicial, and gives the jurors undue weight as to what dollar amount for non-economic  
 15 damages may be reasonable. Counsel should not have instilled in the minds of the jurors a  
 16 number or range – this is an inappropriate interference with the jury’s decision-making process.

17 Social science research has revealed that anchoring greatly influences and interferes with  
 18 the jury decision-making process. *See* Mark A. Behrens, Cry Silverman, Christopher E. Appel,  
 19 “*Summation Anchoring: Is It Time To Cast Away Inflated Requests For Noneconomic*  
 20 *Damages?*” 44 Am. J. Trial Advoc. 321 (Spring 2021). (“*Summation Anchoring*”) (collecting  
 21 examples from various jurisdictions of anchoring resulting in inflated awards and studies  
 22 demonstrating the influence of anchoring on mock jurors). “[O]nce an anchor number has been  
 23 provided, that number exerts undue influence on the final figure” and “can sway decisions even  
 24 when the anchor provided is completely arbitrary.” *Id.* at 322 (quoting Sonia Chopra, *The*  
 25 *Psychology of Asking a Jury for a Damage Award*, PLAINTIFF, Mar. 2013, at 1).<sup>4</sup> Case law

26 <sup>4</sup> Anchoring has been shown to influence jurors’ decisions on damages, even though those jurors  
 27 may not recognize it. *Summation Anchoring* at 322 (“Jurors who are bombarded with  
 information during a trial suffer from cognitive overload and unconsciously welcome the  
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1 supports this concern. “A jury with little or no experience in such matters, rather than rely upon  
 2 its own estimates and reasoning, may give undue weight to the figures advanced by plaintiff’s  
 3 counsel, particularly if he conveys the impression (as frequently happens) that he speaks on the  
 4 basis of extensive trial experience.” *Mileski v. Long Island R. Co.*, 499 F.2d 1169, 1172 (2d Cir.  
 5 1974).

6 The negative, long-term impact of anchoring on the judicial system also should be  
 7 considered by this Court. The authors of “*Summation Anchoring*” concluded:

8 Anchoring practices may successfully help a plaintiff’s lawyer  
 9 obtain an inflated award for noneconomic damages, but these  
 10 excessive awards are often reduced or overturned post-trial or on  
 11 appeal. This cycle is costly and inefficient. ***Further, as defendants  
 balk at settlement demands that reflect the chance for sky-is-the-  
 limit awards, plaintiff recoveries are delayed.***

12 *Id.* at 337 (emphasis added).

13 Not only does anchoring influence or interfere with the jury decision-making process, but  
 14 reference to specific numbers or range is misleading. Although a jury instruction that what  
 15 counsel says is not evidence is commonplace, jurors may not retain this in memory. They also  
 16 may not realize that any suggested figures or ranges for non-economic damages are not based on  
 17 any evidence presented at trial. To the extent to which some or all members of the jury fail to  
 18 remember or otherwise appreciate the distinction between evidence and statements made during  
 19 summation, it is critical to ensure that the jury is not misled or otherwise given the impression  
 20 that the proposed figures or dollar ranges for noneconomic damages are based on evidence  
 21 presented at trial. *See* FRE 403.

22 Anchoring is not at all different from invoking the golden rule, which the Ninth Circuit  
 23 has said is “improper because a jury which has put itself in the shoes of one of the parties is no  
 24 longer an impartial jury.” *Minato v. Scenic Airlines, Inc.*, 908 F.2d 977 at \*5 (9th Cir. 1990)  
 25 (unpublished) (*quoting* Annotation, 68 ALR Fed. 333). Similarly, the Supreme Court of

26 \_\_\_\_\_  
 27 presence of an anchor that will reduce the cognitive effort needed.”) (internal quotation marks  
 omitted).

Washington has described the Golden Rule as “improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.” *Adkins v. Aluminum Co. of America*, 110 Wn. 2d 128, 139-140 (1988) (*quoting Rojas v. Richardson*, 703 F.2d 186, 191 (5th Cir. 1983)), *clarified on denial of reconsideration*, 756 P.2d 142 (1988).

The Manual of Model Civil Jury Instructions for the District Courts of the Ninth Circuit provides that jurors “must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you.” Ninth Cir. Pattern Jury Inst. Nos. 1.2, 1.3. By specifying a figure or range for noneconomic damages, counsel is influencing the jury without any evidence to support the claim. Plaintiff’s Counsel should have been precluded from doing that. As a consequence of Plaintiff’s anchoring, the jury returned a verdict that was excessive and not congruent with Plaintiff’s damages. A new trial is therefore warranted.

## **II. IN THE ALTERNATIVE, AMTRAK IS ENTITLED TO A SUBSTANTIAL REMITTITUR**

### **A. Standard for Remittitur**

A court has discretion to grant a new trial where a verdict appears to be against the weight of the evidence. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996). “That discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner’s refusal to agree to a reduction (remittitur).” *Id.* If this Court does not grant a new trial, a substantial remittitur should be granted.

After viewing the damages in the light most favorable to the prevailing party, if the court finds that the damages award is excessive, it may either deny the motion for a new trial if the prevailing party accepts a remittitur or grant the motion for a new trial. *Arnold v. Pfizer, Inc.*, No. 3:10-CV-01025-AC, 2015 WL 268967, at \*5 (D. Or. Jan. 21, 2015) (*citing Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814 (9th Cir. 2001)). A trial court granting

1 a motion for remittitur does not substitute its judgment for the jury's; it reduces the judgment to  
2 the maximum amount sustainable by the proof. *Id.*

3 Because Plaintiff's claim against Amtrak is governed by Washington law, the Court  
4 should apply Washington law in determining whether the verdict is excessive. *See Gasperini*,  
5 518 U.S. at 426-430 (where state law governs the claim for relief, federal courts must review of  
6 the size of the verdict and a party is precluded from recovery in federal court "significantly larger  
7 than the recovery that would have been tolerated in state court.") (citing *Erie R. Co. v. Tompkins*,  
8 304 U.S. 64 (1938)). *See also Coachman v. Seattle Auto Mgt. Inc.*, 787 Fed. Appx. 416, 417 (9th  
9 Cir. 2019) (applying Washington standard in deciding whether an award of damages was  
10 excessive).

11 Under Washington law, the jury's award for noneconomic damages "must be in  
12 proportion to the injury suffered" and supported by competent evidence. *Hill v. GTE Directories*  
13 *Sales Corp.*, 71 Wn. App. 132, 140 (1993). The Washington remittitur statute provides that the  
14 trial court may order a remittitur, as an alternative to a new trial, if the award of damages is so  
15 excessive "as unmistakably to indicate that the amount thereof must have been the result of  
16 passion or prejudice." RCW 4.76.030. The Supreme Court of Washington has stated that an  
17 award of damages made by the jury should not be disturbed "unless it is outside the range of  
18 substantial evidence in the record, or shocks the conscience of the court, or appears to have been  
19 arrived at as the result of passion or prejudice." *Pendergrast v. Matichuk*, 186 Wn. 2d 556, 569  
20 (2016) (internal quotations omitted).

## 21 **B. The Verdict Amounts Warrant a Substantial Remittitur**

22 The jury awarded Plaintiff total non-economic total damages of \$8,000,000, comprised  
23 of \$2,500,000 in past non-economic damages and \$5,500,000 in future non-economic damages.  
24 Dkt. 64. As discussed above in Point I (B)(1), these amounts are grossly excessive and against  
25 the weight of the evidence. The Court should grant Amtrak a substantial remittitur to prevent  
26 injustice.

27 The \$2,500,000 for past non-economic damages is excessive based upon the extremely

1 active life the Plaintiff has enjoyed in the last four and a half years. After she recovered from the  
 2 initial trauma of the accident, she returned to University of Washington and graduated with flying  
 3 colors. She has traveled extensively in Europe and Egypt during the past four years, which has  
 4 added a rich diversity to her life experience. She has taken various forms of public transportation  
 5 throughout that time, including trains. Her past non-economic damages should be reduced to  
 6 \$2,000,000 at most.

7 The award of \$5,500,000 for future non-economic damages also shocks the conscience,  
 8 given Plaintiff's excellent recovery. She has a successful career and an exciting new life in  
 9 Cairo. There was no testimony that Plaintiff could not attend graduate school or start her own  
 10 family. As discussed above, her treating provider, Dr. Crossen, acknowledged that Plaintiff had  
 11 emotional or behavior issues before the derailment, and, in any event, testified that he was  
 12 optimistic that Plaintiff would recover with therapy. Dr. Scovel was hopeful in 2018 that Plaintiff  
 13 would fully recover and in 2020 her prognosis for Plaintiff was even better than it was in 2018.  
 14 Thus, there is no basis for the jury's excessive non-economic award for the future, as it should  
 15 be substantially less than the past award. The future non-economic award should be reduced to  
 16 \$1,000,000, at most.

17 The excessive nature of the jury's award of \$2,500,000 for past non-economic damages  
 18 and \$5,500,000 for future non-economic damages is demonstrated by the verdict in *Steele v.*  
 19 *Amtrak*, No. C19-5553, arising out of the same accident as this case and also involving a young  
 20 plaintiff. There, the *Steele* plaintiff was awarded \$960,000 for past non-economic damages and  
 21 \$2,000,000 for future non-economic damages. *See Steele*, Dkt. 126 (4/19/22 Order at 20).

22 As this Court observed in denying Amtrak's motion for a new trial in *Steele*, the alleged  
 23 injuries in *Steele* were worse than those in *Torjusen*. Yet the non-economic damages were  
 24 significantly lower in *Steele*. *See Steele*, Dkt. 126 (4/19/22 Order at 7) ("Amtrak recently  
 25 obtained an arguably worse result in [Torjusen] tried in person (but otherwise tried in much the  
 26 same way, with a similar jury pool, voir dire, facts, evidence, cross examination, arguments and  
 27 jury instructions) . . . , which involved a mild traumatic brain injury and an \$8 million verdict,

1 with no economic damages sought or awarded.”).

2 In *Steele*, the plaintiff was a 24 year-old female who alleged the following injuries:  
3 traumatic brain injury / concussion, neck injury, post concussive syndrome, post concussive  
4 visual syndrome, vision issues, post-traumatic stress, anxiety, depression, adjustment disorder  
5 and cognitive injuries. The Steele plaintiff’s concussion expert (Dr. Chestnutt) testified that she  
6 was “not improving overall,” that her brain injuries are permanent and that she is unable to hold  
7 a regular job because of her functional capacity limitations. *Steele*, Dkt. 126 (4/19/22 Order at  
8 16-17). The Steele plaintiff’s life care plan included amounts for her future in-home care and  
9 accommodations because she was not independent in the activities of daily life. *Id.* at 18.

10 As set forth above, Plaintiff has had a completely different recovery from this accident,  
11 including obtaining her college degree with excellent marks and a triple major, extensive  
12 independent travel around the world and a successful career in Cairo where she is the Chief  
13 Executive Officer of a company and where she resides with her partner. Unlike the Steele  
14 plaintiff, Plaintiff in this case had no need for damages for future medical expenses and future  
15 wage losses. *See id.* at 15-19.

16 The two cases are not even close in terms of the alleged damages and recovery from same.  
17 Yet, the Torjusen jury awarded more than double the Steele damages for past non-economic  
18 damages and almost triple the Steele damages for future non-economic damages. This shocking  
19 discrepancy demonstrates that Plaintiff’s counsel’s prejudicial comments in his closing and his  
20 \$23 million anchor argued to the jury resulted in an excessive verdict that warrants a substantial  
21 remittitur, as this excessive verdict was the result of passion and prejudice, stoked by Plaintiff’s  
22 counsel’s improper argument.

### 23 CONCLUSION

24 For the reasons above, Amtrak respectfully requests the following relief:

- 25 1. A new trial on all issues; or, in the alternative, or in the alternative,
- 26 2. Entry of an amended judgment or remittitur reducing the jury’s excessive and  
27 unsupported compensatory damages awards as set forth above.

1 DATED: May 2, 2022

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